CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 144/15

In the matter between

ISAAC RASEPITLE PITJE	Applicant
and	
JOSIAH OUPA SHIBAMBO	First Respondent
ESTHER VELEMINAH SHIBAMBO	Second Respondent
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	Third Respondent

Neutral citation:	*Pitje v Shibambo and Others* [2016] ZACC 5
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Nkabinde J, Nugent AJ, Van der Westhuizen J, Zondo J
Judgment(s):	Nkabinde J (unanimous)
Decided on:	25 February 2016
Summary:	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 — double-sales — just and equitable enquiry — eviction

ORDER

On appeal from the High Court of South Africa, Gauteng Division, Pretoria:

1. Condonation for the late filing of the application for leave to appeal is granted.
2. Leave to appeal is granted.
3. The appeal is upheld and the order of the High Court of South Africa, Gauteng Division, Pretoria is set aside.
4. The applicant's application in the High Court to file an additional affidavit by way of rejoinder is granted.
5. The matter is remitted to the High Court for reconsideration in accordance with this judgment.
6. The costs in this Court should follow the result of the reconsideration of the matter in the High Court.

JUDGMENT

NKABINDE J (Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Nugent AJ, Van der Westhuizen J, Zondo J concurring):

Introduction

[1] This is an application for leave to appeal against an order of the High Court of South Africa, Gauteng Division, Pretoria (High Court), granting, with costs, an eviction of the applicant, Mr Pitje, "and all those holding under him" from erf 4157, Block M, Mamelodi Township, Pretoria (property).[1] The High Court refused leave to

[1] *Shibambo and Another v Pitje and Another* [2015] ZAGPPHC 89 (High Court judgment).

appeal with costs and so did the Supreme Court of Appeal.[2] The applicant also seeks condonation for the late filing of this application.

[2] The first and second respondents (Mr and Mrs Shibambo) oppose the application. The third respondent, City of Tshwane Metropolitan Municipality (Municipality), has not filed any papers. The parties were invited to make written submissions and the Court has decided the dispute without an oral hearing.

[3] This matter turns on the application of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[3] (PIE), in particular, whether there was compliance with the requirements of section 4.[4]

Facts

[4] Mr Pitje, aged 76 and in ill-health, lives at the property which is his primary residence and home. The property was part of his late father's estate and Mr Pitje and his siblings grew up living on the property. On 19 June 1992, the property was registered in the name of Mr Pitje's brother (brother) against a bond in favour of Nedcor Bank for a purchase price of R14 000. In 2001, the brother experienced financial difficulty and Nedcor sought to sell the property in execution because of the brother's default on the bond. Following negotiations between Nedcor, Mr Pitje, and the brother, Mr Pitje took over the bond payments pursuant to agreeing to a deed of sale, in which he was purchaser of the property from the brother for a price of R63 000.

[5] While the sale was conditional on the usual clause for obtaining a loan for the purchase price, a special condition in clause 20 provided:

[2] Leave to appeal was refused by the High Court on 16 April 2015 and the petition to the Supreme Court of Appeal was dismissed on 14 July 2015.

[3] 19 of 1998.

[4] See [15] below.

> "Should the said loan not be secured, then the purchaser is irrevocably authorised by the seller to make whatever arrangements with Nedcor Bank Ltd, the current bond holders, to liquidate the outstanding amount on the bond, until the above purchase price is paid in full, whereupon the transfer shall be given to the purchaser as aforesaid."

[6] Mr Pitje alleges that he made payments to Nedcor but, at some undisclosed point, Nedcor inexplicably informed him that the bond account had been closed. An agreement between Nedcor and Mr Pitje indicates that as at 12 December 2001 (before the payment of the first instalment on 1 January 2002) the bond account stood at R52 069. Eight years later, Mr and Mrs Shibambo, as purchasers, and the brother, as the seller, signed a deed of sale, with Bluegloo.com, as estate agents. The purchase price was for R380 000 and the deed of sale contained a hand-written clause which stated that "[e]viction if needed will be done by seller on the seller's cost. Bluegloo.com will contribute R5000 towards the costs of an eviction if eviction takes place."

[7] In a letter dated 26 August 2010, Mr Pitje's attorneys informed Mr and Mrs Shibambo that the brother had "ceded all his rights in respect of the . . . property to [Mr Pitje]" and further alleged that the brother's actions, in selling and transferring the property to the Shibambos, were unlawful and wrongful. However, before the letter was sent, the property had already been transferred into the name of Mr and Mrs Shibambo, on 7 July 2010.

High Court proceedings

[8] The dispute arose in the High Court where Mr and Mrs Shibambo had launched and obtained an eviction order against Mr Pitje. The order was granted by default as Mr Pitje had failed to file opposing papers despite having filed a notice of intention to oppose.

[9] Mr Pitje applied for variation of the eviction order and that it be set aside as well as to have the property registered in his name.[5] It was conceded on behalf of Mr Pitje in argument that the order of variation sought could not succeed but it was argued that an order rescinding the default order was appropriate in the circumstances. The Court, per Bam J, thus rescinded the default order and allowed Mr Pitje to file his opposing papers in the eviction proceedings.[6]

[10] Mr Pitje's defence to the eviction was that the sale between Mr Pitje and the brother was valid and enforceable and that Mr and Mrs Shibambo were not bona fide purchasers and hence the transfer into their names was assailable. He alleged, in the alternative, that Mr and Mrs Shibambo had not complied with the requirements of section 4(2) of PIE.[7] The brother filed a confirmatory affidavit on behalf of Mr and Mrs Shibambo.[8] He said that Mr Pitje failed to fulfil the suspensive condition in the deed of sale and that it had therefore lapsed. The brother denied Mr Pitje's allegation that the Shibambos knew, or ought to have known, of the prior sale and that clause 20 formed part of the original deed of sale.

[11] The High Court, per Legodi J, granted the order for eviction.[9] The Court considered the issue of double sales and, on the strength of *Bowring*[10] held that

[5] It is to be noted that Mr Pitje had also sought an order in terms of rule 30A of the Uniform Rules of Court to strike out certain allegations made in reply which, he contended, introduced new evidence. The most pertinent is that Mr and Mrs Shibambo alleged that Mr Pitje had been granted approval for a government house in March 2008 which, it was alleged, could only be done if Mr Pitje was not the owner of another property. This also showed that Mr Pitje had alternative accommodation. The High Court did not grant the order to strike out as it considered it unnecessary in the light of the finding on the issue of the double sale.

[6] *Pitje v Shibambo and Others* [2014] ZAGPPHC 501.

[7] That it is specifically section 4(2) of the Act is not clear from the eviction order itself, but the High Court judgment is clearly referring to notice under the Act, which is given in terms of section 4(2). In addition, one of the grounds of attack on the High Court judgment by Mr Pitje is that he alleges he was not given notice in terms of section 4(2).

[8] It is to be noted, however, that the full affidavit was not attached to the Shibambo's papers and so further allegations may have been denied.

[9] High Court judgment above n 1.

[10] *Bowring v Vrededorp Properties CC and Another* [2007] ZASCA 80; 2007 (5) SA 391 (SCA) (*Bowring*). In this case the Supreme Court of Appeal dealt with the application of the doctrine of notice to successive sales of the same property. It held that there is no reason in principle why the first purchaser should not be allowed, in a suitable case, to claim transfer or delivery of the property directly from the second purchaser who acquired the

Mr Pitje bore the onus of showing that Mr and Mrs Shibambo had prior knowledge of the sale between Mr Pitje and the brother. It held that Mr Pitje failed to discharge this onus and thus that Mr and Mrs Shibambo were bona fide purchasers who obtained unassailable rights to the property once it was transferred.

[12] Regarding the requirements of PIE, the High Court held:

> "Initially, [Mr Pitje] wanted to suggest that [Mr and Mrs Shibambo] were not entitled to the relief sought because there was no compliance with section 4 of [PIE]. It is not correct. Such a notice was given and the order in this regard was granted. In any event, counsel for [Mr Pitje] did not pursue the point."[11]

In this Court

Condonation

[13] The application for leave to appeal was filed seven days late. Mr Pitje explains that the order of the Supreme Court of Appeal was received only on 23 July 2015. His attorney, Mr Sibiya (who deposed to the supporting affidavit), mistakenly believed he was to calculate the 15 days in terms of rule 19 from date of receipt, not the date of the order. Mr Sibiya realised his error but then had trouble finalising the properly bound volumes for filing at this Court. When the candidate attorney filed the papers he was advised that a condonation application was necessary. Mr Sibiya rightly accepts that the blame lies at his door but argues that the delay was clearly unintentional and thus contends that no adverse consequence should be visited upon the applicant. The respondents do not oppose condonation. The explanation is acceptable. I would condone the late filing of the application for leave to appeal.

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property with knowledge of the first sale. Whether this should happen should be determined largely by what is equitable to all concerned in the circumstances of the case.

[11] High Court judgment above n 1 at para 13.

Leave to appeal

[14] The matter raises constitutional issues of importance. These are the right to property[12] and the right to have access to adequate housing and not to be evicted from a place called home without an order of court made after considering all relevant circumstances.[13] His papers, properly understood, make the point that, if evicted, Mr Pitje will be rendered homeless. It is contended that the approach of the High Court, relying on *Bowring*, would encourage fraudsters to act in a similar manner to the brother as alleged and that it is in the general public's interest that this be corrected. Without imputing fraud to the brother, I agree. The points raised are arguable and there are prospects of success with regard to the eviction order of the High Court. Leave to appeal should be granted.

Was PIE correctly applied? And was the High Court correct in disallowing a rejoinder?

[15] In relevant parts, section 4 of PIE provides:

> "(1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.
>
> (2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.
>
> . . .
>
> (7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the

[12] In terms of section 25 of the Constitution.

[13] In terms of sections 26(1) and 26(3) of the Constitution, respectively.

> unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."

[16] It is clear from the reading of the judgment of the High Court that the requirements of section 4 of PIE were not fully considered. The Court merely noted that the default judgment had included an eviction order. But the default judgment was rescinded. It also says Mr Pitje's counsel "did not pursue the point".[14] Seemingly on the strength of this, given that the primary defence had failed, the High Court granted an order evicting Mr Pitje from the house. No consideration was given to the issue of suitable alternative accommodation for Mr Pitje. The High Court declined to deal with Mr Pitje's application to strike out[15] the Shibambos' allegation in reply that Mr Pitje had suitable alternative accommodation. It held that:

> "[I]t [is not] necessary to deal with the merits or otherwise of the point taken. . . seen in the light of my finding regarding the doctrine of notice and bona fide purchaser and failure to set aside the second sale agreement and transfer."

[17] It is not clear what difference these findings make to the question whether it was just and equitable to grant the eviction given the considerations set out in section 4(7) of PIE. It does not appear from the eviction order that the High Court had regard to the relevant provisions of section 4, as it was obliged to do.[16] In *Machele*, this Court, per Skweyiya J, made it clear that the application of PIE is not discretionary. The Court remarked:

> "Courts must consider PIE in eviction cases. PIE was enacted . . . to ensure fairness in and legitimacy of eviction proceedings and to set out factors to be taken into account by a court when considering the grant of an eviction order. Given that

[14] High Court judgment above n 1 at para 13.

[15] In terms of rule 30A of the Uniform Rules of Court.

[16] See *Machele and Others v Mailula and Others* [2009] ZACC 7; 2010 (2) SA 257 (CC); 2009 (8) BCLR 767 (CC) (*Machele*) at para 15.

> evictions naturally entail conflicting constitutional rights, these factors are of great assistance to courts in reaching constitutionally appropriate decisions."[17]

[18] Mr Pitje is 76 years old and in ill-health. He has lived at the property for his whole life. Mr Pitje unsuccessfully attempted to inform the High Court, in his application for rejoinder, that he does not have suitable alternative accommodation. The refusal for rejoinder means that the High Court did not consider all the relevant circumstances of Mr Pitje, including his disability and a possibility that the eviction could render him homeless. The High Court erred in not doing so. It should have allowed the rejoinder. The order I make reflects this.

[19] Moreover, courts cannot necessarily restrict themselves to the passive application of PIE. Even if there had been no rejoinder application, courts are obliged to probe and investigate the surrounding circumstances when an eviction from a home is sought. This is particularly true when the prospective evictee is vulnerable.[18] These considerations would have enabled the High Court to apply the requirements of PIE justly.

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[17] Id at para 14.

[18] See *Arendse v Arendse* 2013 (3) SA 347 (C) (*Arendse*) at paras 41-2. In this case the order evicted Ms Arendse and three minor children from the family home. They had no alternative suitable accommodation. The eviction would have rendered them homeless. The High Court correctly held that-

> "neither the applicant nor her children had suitable alternative accommodation on a permanent basis. . . . . A proper enquiry would have made it clear that an eviction order would render the applicant and her children homeless, a circumstance which could never be considered to be just and equitable. The applicant and her children's rights of access to adequate housing were, accordingly, infringed and she is entitled to the declaration to that effect which she seeks.
>
> Then there is the question of the applicant's vulnerability. It is not disputed that the applicant is, and was at the time of the eviction order, afflicted by a disability as was evident from the medical evidence before the court a quo and unemployed, if not unemployable. These circumstances warranted consideration and investigation by the presiding magistrate as did the applicant's insistence that she was not financially independent and could not afford to rent a residence. Instead the court a quo appeared to have been swayed by her pension pay-out even though there was no evidence that this enabled her to afford alternative accommodation. The second respondent's reasons for judgment focused on the first respondent's property rights at the expense of the circumstances of the applicant and her children. The position was compounded by the fact that the applicant was not represented at the hearing in the court a quo."

[20] Consequently, the Shibambos were incorrect to contend that, because Mr Pitje did not disclose the information about his risk of homelessness under oath, the High Court could not consider (i) his alternative accommodation options, (ii) his health or disability or (iii) the situation of other occupants.

[21] Reliance on *Bowring* was misplaced because that case did not concern eviction from the property in question. It related to the double sale of property. While *Bowring* answers the question whether the Shibambos had standing as owners to seek eviction, it does not answer whether the eviction itself was just and equitable. In any event, section 4(1) of PIE provides that "[n]otwithstanding anything to the contrary contained *in any law or the common law*, the provisions of this section apply to proceedings by an owner . . . for the eviction of an unlawful occupier".[19] This is telling.

Conclusion

[22] The matter should be remitted to the High Court for reconsideration in the light of this judgment. To this end, the parties may supplement their papers regarding section 4 of PIE. Costs should follow the result of the reconsideration of the matter in the High Court.

[23] Once this matter is remitted to it, the High Court should proceed from the premise that Mr Pitje's application to file an affidavit by way of rejoinder has been granted. The High Court should have regard to the contents of the affidavit. It may order the filing of further affidavits by the parties as the rejoinder may require. The High Court should then consider, in the light of all the evidence and further argument, whether an eviction order is justified under PIE.

Order

[24] The following order is made:

[19] Emphasis added.

1. Condonation for the late filing of the application for leave to appeal is granted.
2. Leave to appeal is granted.
3. The appeal is upheld and the order of the High Court of South Africa, Gauteng Division, Pretoria is set aside.
4. The applicant's application in the High Court to file an additional affidavit by way of rejoinder is granted.
5. The matter is remitted to the High Court for reconsideration in accordance with this judgment.
6. The costs in this Court should follow the result of the reconsideration of the matter in the High Court.

For the Applicant:	Mthembu Sibiya Attorneys
For the First and Second Respondents:	N van Niekerk instructed by MacRobert Inc Attorneys